



# **EU Copyright Reform: The Case for a Related Right for Press Publishers**

CREATE Public Lecture  
15 February 2017  
University of Glasgow

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Hausfeld, Berlin

**HAUSFELD**



# Contents

- 1 The proposed Directive in a nutshell**
- 2 Justification for a publisher's right
- 3 Some myths about the new right

# Proposal for a Directive on Copyright in the Digital Single Market

## **Article 11**

### ***Protection of press publications concerning digital uses***

*(1) Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.*

# Article 2 of Directive 2001/29/EC

## **Article 2**

### **Reproduction right**

*Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:*

- (a) for authors, of their works;*
- (b) for performers, of fixations of their performances;*
- (c) for phonogram producers, of their phonograms;*
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;*
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.*

# Article 3 (2) of Directive 2001/29/EC

## **Article 3**

### ***Right of communication to the public of works and right of making available to the public other subject-matter***

*[...]*

- (2) Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:*
- (a) for performers, of fixations of their performances;*
  - (b) for phonogram producers, of their phonograms;*
  - (c) for the producers of the first fixations of films, of the original and copies of their films;*
  - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.*

# Proposal for a Directive on Copyright in the Digital Single Market

## *Article 2* *Definitions*

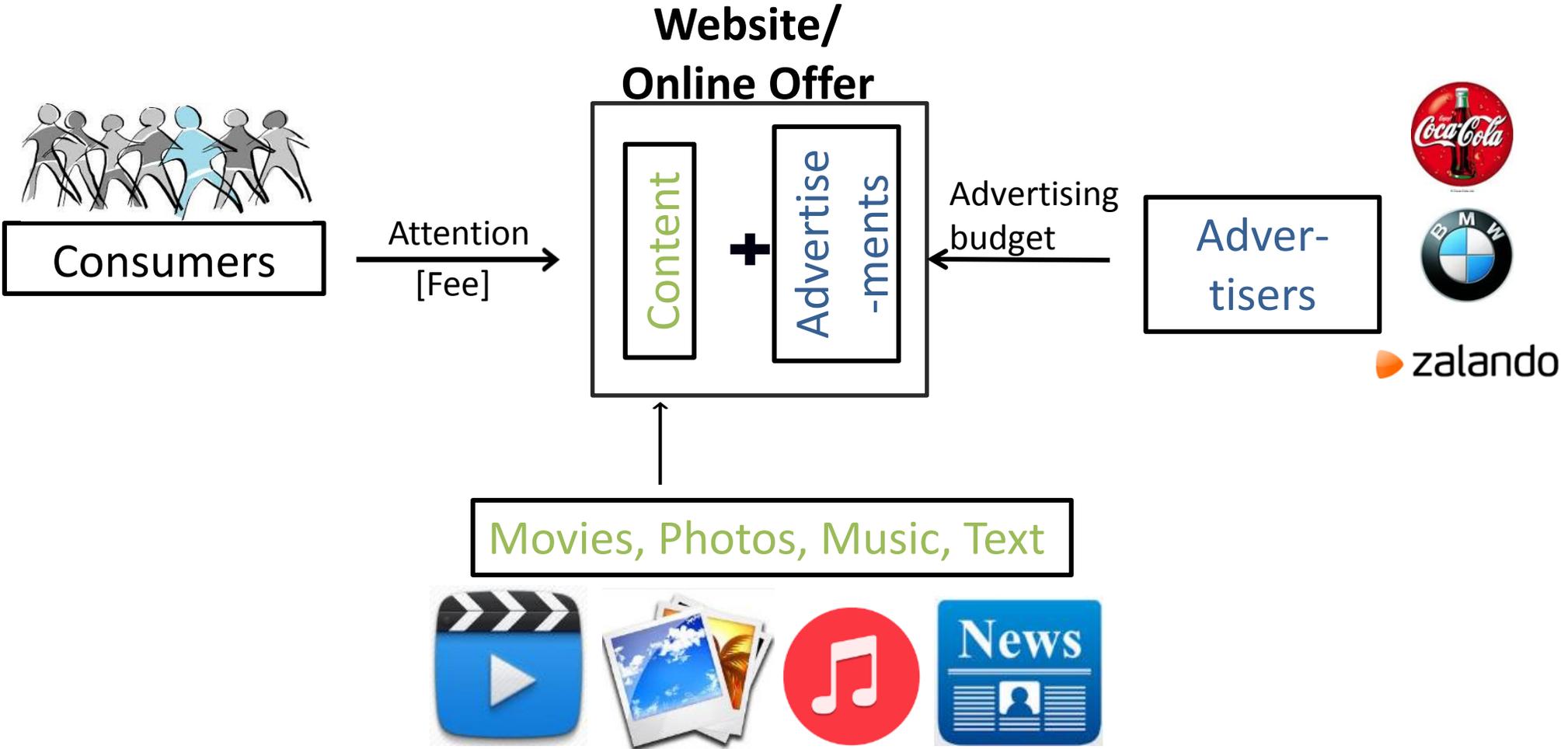
*For the purposes of this Directive, the following definitions shall apply:  
[...]*

(4) ‘press publication’ means a **fixation** of a collection of **literary works of a journalistic nature**, which may also comprise other works or subject-matter and constitutes an individual item **within a periodical or regularly-updated publication** under a single title, such as a newspaper or a general or special interest magazine, having the purpose of **providing information related to news or other topics** and published in any media under the initiative, editorial responsibility and control of a service provider.

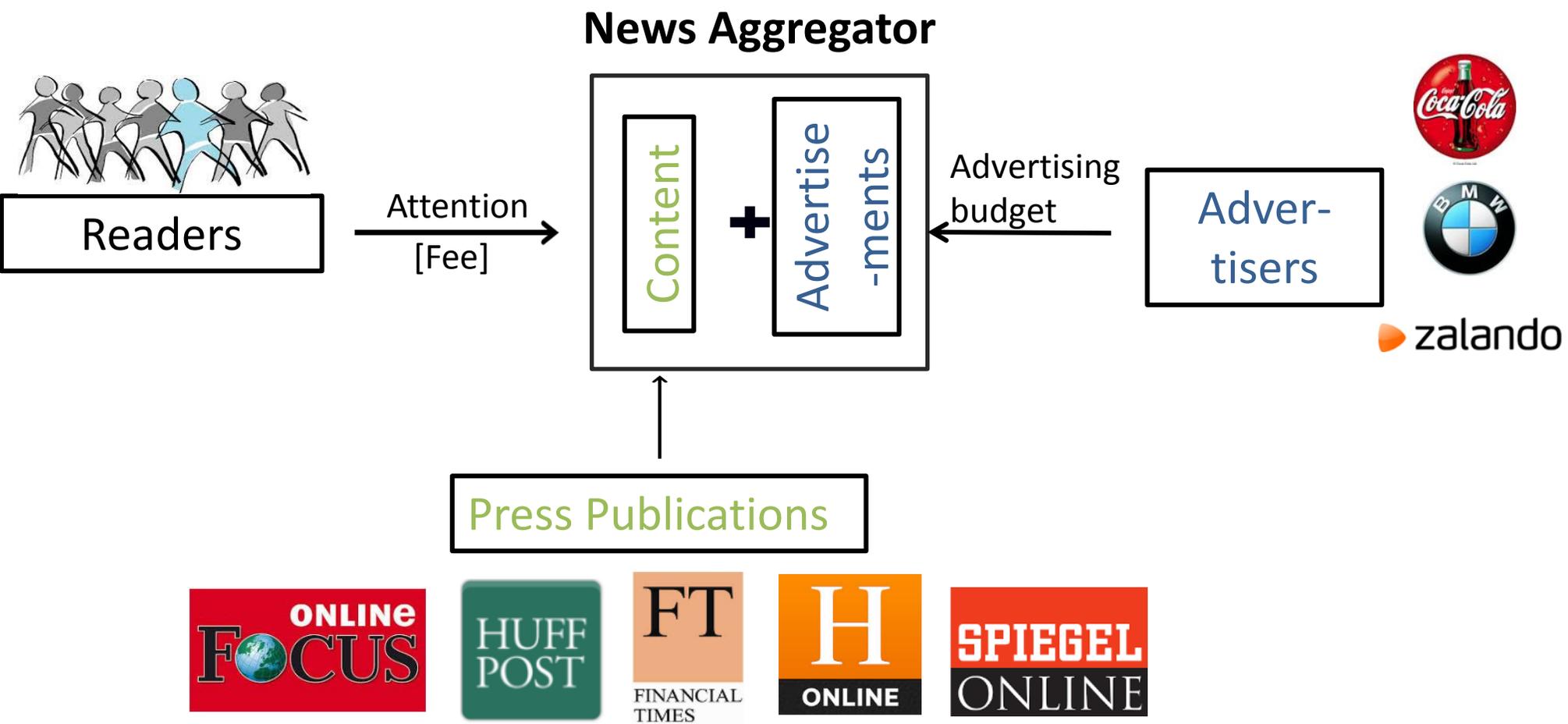
# Contents

- 1 The proposed Directive in a nutshell
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# My content – Your business model? Free riding of news aggregators



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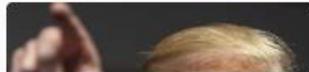
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Reuters reports;



### UPDATE 10pm Central Time = Trump 95% chance of winning

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trump event live hillary event live (update - canceled) Cheers :)



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# Example 1

## Marijuana wins big on election night - The Washington Post



Seeded by Kenm77

Seeded on Tue Nov 9, 2016 02:17 PM

politics, us, marijuana, pot, ma, recreationaldrug

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### WaPo reports:

Voters in California, Massachusetts and Nevada approved recreational marijuana initiatives Tuesday night, and several other states passed medical marijuana provisions in what is turning out to be the biggest electoral victory for marijuana reform since 2012, when Colorado and Washington first approved the drug's recreational use.

Of the five recreational marijuana initiatives on the ballot, three passed and one more — in Maine — were leading at midnight in preliminary vote totals. A similar measure in Arizona was trailing with 62 percent of votes counted.

On the medical side, voters in Florida, North Dakota and Arkansas have approved medical marijuana initiatives. A separate measure in Montana that would loosen restrictions on an existing medical pot law is currently leading with only 30 percent of votes counted so far.

Reformers were jubilant. "This represents a monumental victory for the marijuana reform movement," said Ethan Nadelmann, executive director of the Drug Policy Alliance, in a statement. "With California's leadership now, the end of marijuana prohibition nationally, and even internationally, is fast approaching."

California has long been seen as a bellwether by both supporters and opponents of marijuana reform. The state is home to about 12 percent of the U.S. population. Given the size of the state's economy and the economic impact of the marijuana industry there, California's adoption of legal marijuana could prompt federal authorities to rethink their decades-long prohibition on the use of marijuana for any purpose.

In a recent interview with BBC's Mehler, President Barack Obama said that legalization in California could make the current federal approach to the drug "untenable."

Still, the likelihood of a Trump White House leaves a lot of uncertainty about the fate of marijuana measures in the next four years. Under Obama, federal authorities largely took a hands-off approach to state-level legalization efforts. But an incoming administration more skeptical of drug reform could easily reverse that approach.

"The prospect of Rudy Giuliani or Chris Christie as attorney general does not bode well," the Drug Policy Alliance's Nadelmann said in an interview. "There are various ways in which a hostile White House could trip things up."

Full story in article.

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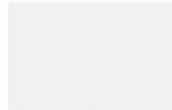
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#### Does your product suck? Stop adding new features and "zoom in" instead

(Adapted from an answer I wrote on Quora, and thought I'd share it on my blog too.) Adding a lot more features won't save your product. Everyone's worked on a product it's falling despite a ton of work behind it. It's not for lack of great 200+ Andrew Chen (@andrew\_chen) / by Andrew Chen / 11d



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Blink: The Power of Thinking Without Thinking \$18.95 5 stars



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## Example 2

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Daily Mail - 25 minutes ago

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+ Learn British English Free : Scottish Independence This lesson is a very brief introduction to the Scottish Independence vote in September, 2014. Please enable English captions (subtitles) and see below for notes: Vote takes place on 18 September, 2014: "Should Scotland be an independent country?" A "yes" vote would mean Scotland would become separate from the rest of the UK. Alex Salmond, "Yes Campaign". Alastair Darling, "No Campaign" ("Better Together"). Only p...



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### Ashya King's brother Danny finally allowed to visit him in hospital

Daily Mail - 4 minutes ago

More than 125,000 people have signed a petition demanding the jailed parents of terminally ill Ashya King must be released and allowed to visit their son in hospital.

Clegg calls for Ashya King to be reunited with parents [BBC News](#)  
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MOSCOW, September 2 (RIA Novosti) - The United States and the European Union should support the process started in Minsk, Belarus, to find a compromise in order to settle the crisis in Ukraine, Russian Foreign Minister Sergei Lavrov said Tuesday.



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Mirror.co.uk - 30 minutes ago

Arsenal got a terrific deal done on Danny Welbeck because he is young, English, has got pace and power and, at £16m, looks a very good signing.



### NATO vs. Putin: Ukraine crisis redefining much more than borders

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Today	Wed	Thu	Fri
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[Financial Times](#) - 22 hours ago

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Example 3

02  
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### 25.000 Immigranten im ersten Jahr - SPD will Einwanderungsgesetz nach kanadischem Vorbild beschließen

Noch vor dem Bundestagswahlkampf 2017 will die SPD ein neues Einwanderungsgesetz verabschieden. Immigranten von außerhalb der EU sollen nur noch nach Deutschland kommen dürfen, wenn sie in fünf verschiedenen Kriterien genügend Punkte erzielen – ähnlich wie es Kanada praktiziert.

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9.910 9.704 172 34

03  
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### Wettervorhersage - Bis zu zehn 10 Zentimeter! Hier fällt in wenigen Stunden der erste Schnee

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7.588 7.561 16 11

04  
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DEUTSCHER FUSSBALL-BUND am 06.11.2016 UM 10:00 UHR

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### Löw als "Legende des Sports" ausgezeichnet

Joachim Löw ist beim 35. Sportpresseball als "Legende des Sports" geehrt worden. Den Preis bekam der Weltmeister-Coach von Ex-Nationalspieler Miroslav Klose überreicht. Die Laudatio hielt DFB-Präsident Reinhard Grindel.

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7.561 7.205 356 0

## Example 4

„social media, news aggregators and search engines are, [...] the main way to read news online for 57 % of users in the EU.

**47 % of consumers browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page, which erodes advertising revenues from the newspaper webpages”**  
Commission, Impact Assessment, 14.9.2016

05  
PLATZ



FOCUS ONLINE am 06.11.2016 UM 08:41 UHR

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### +++ Flüchtlingskrise im News-Ticker +++ - De Maizière will Flüchtlingsboote nach Afrika zurückschicken

Nach der Schließung der Balkanroute wagen immer mehr verzweifelte Flüchtlinge die gefährliche Reise über das Mittelmeer. Hunderte Menschen ertrinken dadurch pro Woche an Europas Außengrenze. Der sogenannte Dschungel von Calais soll aufgelöst werden, doch viele Menschen weigern sich zu gehen. Lesen Sie die aktuellen Entwicklungen der Flüchtlingskrise im News-Ticker von FOCUS Online.

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7.032 6.965 31 36

06  
PLATZ



DIE WELT am 06.11.2016 UM 04:16 UHR

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### Zuwanderung: "Aus Asyl-Recht ist ein Jedermann-Recht geworden"

Hans-Jürgen Papier, Ex-Präsident des Verfassungsgerichts, stärkt Seehofers Position in der Flüchtlingsfrage. Eine Begrenzung der Flüchtlingszahlen sei politisch "nötig" und "rechtlich möglich".

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5.744 5.187 541 16

07  
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KRONEN ZEITUNG am 06.11.2016 UM 07:10 UHR

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### Deutsche streiten um Verbot von Kinderehen

Nach der Einreise von Hunderttausenden Flüchtlingen lässt das Thema Integration Europa nicht zur Ruhe kommen. Sorgen zuletzt etwa im Sommer Verbote von Burka und Burkini für heiße Diskussionen, ist jetzt in Deutschland eine heftige Debatte über Kinderehen entbrannt. Während sich SPD und Union für ein klares Verbot einsetzen, sprechen sich Justizminister Heiko Maas und die Integrationsbeauftragte der Berliner Bundesregierung (beide SPD) gegen ein allgemeines Verbot aus.

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# the shift towards „direct answers“ - and its consequences for press publishers

## Google's chairman Eric Schmidt 2014:

*“Speed and simplicity really matter. It's why **the best answer is quite literally ... the answer.** If you ask “how do I get to Hamburg by train”, you want the railway timetable right there on the screen -- no extra effort required. And that is what Google provides. [..]*

*Google “Berlin weather” and you'll no longer get ten blue links that you need to dig through. Instead, you'll get the weather forecast for the next few days at the top result, saving you time and effort. Or Google “bratwurst” ... and at the top will be images, nutrition facts, and a web page with a recipe. Stand next to a historic monument and ask “how high is the Brandenburg Gate?” And we'll get you the answer, right there on your screen. [..] **[T]he goal of a search engine is to deliver relevant results to users as quickly as possible. Put simply, we created search for users, not websites.”***

# What is the content of the proposed press publisher's right?

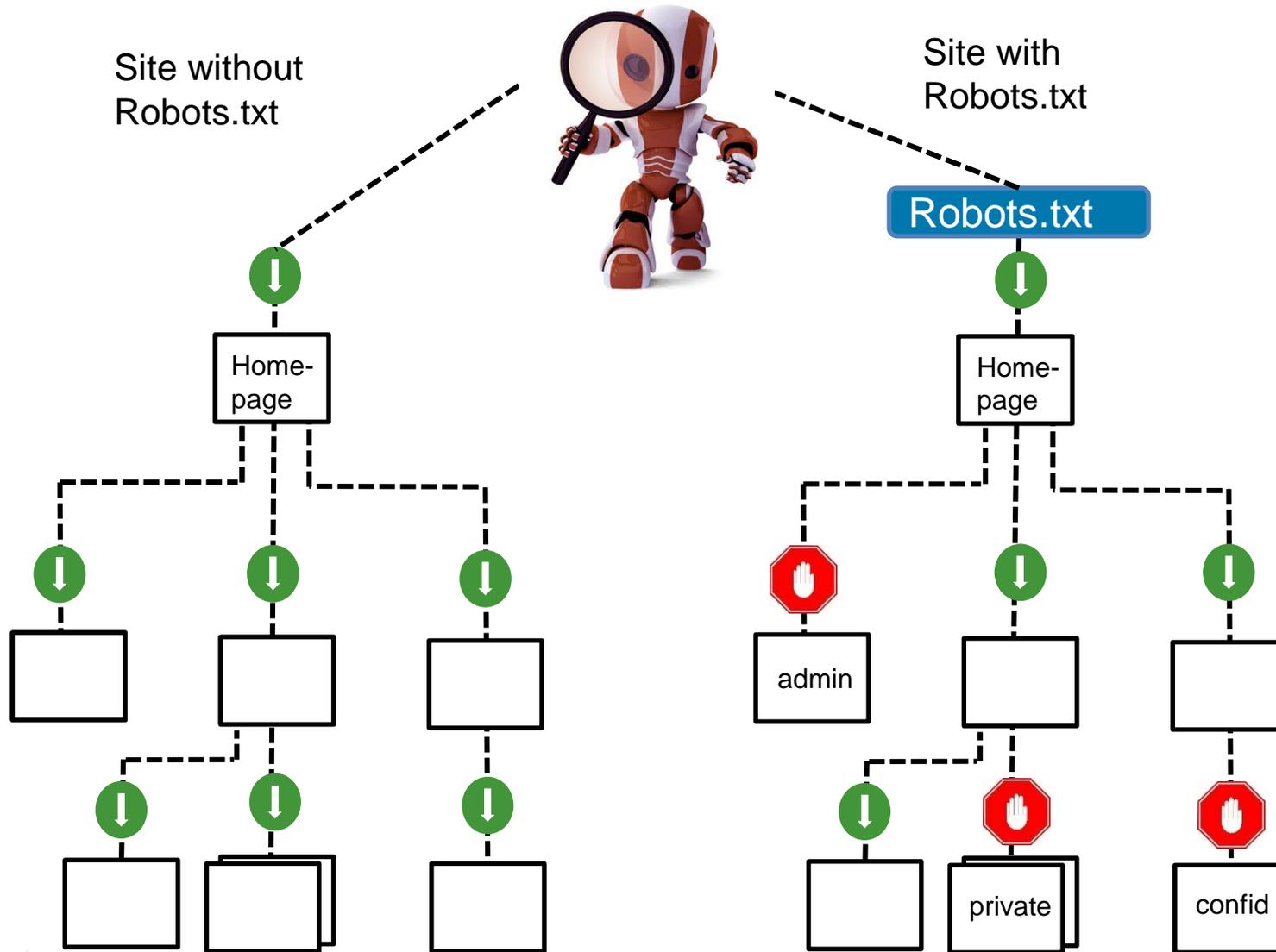
1. **Own right** of a press publisher to protect its publications
2. **Akin to existing** related rights for broadcasters, **film** and **music producers**
3. Right **acknowledges investments of the press publisher** beyond contributions of journalists and photographers (e.g. editing, publishing, legal responsibility)
4. Addressed at every unauthorised reproduction or making available of press publications – **no „link-tax“ or „Google-tax“**
5. Publishers are free to waive their rights – **no compulsory exploitation**

# Why do publishers require their own right in addition to that of authors?

1. Press publishers engage many **freelancers** as journalists and photographers
2. Freelancers only grant non-exclusive licenses to press publishers
3. **Non-exclusive licenses do not suffice to enforce the rightholder's** (journalists/photographer) claims in court
4. In absence of their own right, press publishers are dependent on demonstrating a complete **chain of rights** for all affected items

# Robots Exclusion Protocol (REP) as Solution?

## How it Works I: The Robots.txt



# Robots Exclusion Protocol as Solution?

## How it Works II: Robots Meta-Tags



DIRECTIVE	DESCRIPTION	EXAMPLE
<b>Noindex</b>	Instructs search engines <b>NOT</b> to index this page	<code>&lt;meta name="robots" content="noindex" /&gt;</code>
<b>Nofollow</b>	Instructs search engines <b>NOT</b> to follow or drain any link juice for any outbound links.	<code>&lt;meta name="robots" content="nofollow" /&gt;</code>
<b>Nosnippet</b>	Instructs search engines <b>NOT</b> to show any search results for this page.	<code>&lt;meta name="robots" content="nosnippet" /&gt;</code>
<b>Noarchive</b>	Instructs search engines <b>NOT</b> to show a cache link for this page.	<code>&lt;meta name="robots" content="noarchive" /&gt;</code>
<b>Noodp</b>	Instructs search engines <b>NOT</b> to use Open Directory Project descriptions in the SERPs.	<code>&lt;meta name="robots" content="noodp" /&gt;</code>
<b>Follow</b>	Default implied directive that says "follow" all outbound links	<code>&lt;meta name="robots" content="follow" /&gt;</code>
<b>Index</b>	Default implied directive that says "index" this page.	<code>&lt;meta name="robots" content="index" /&gt;</code>

# Why the REP does not suffice I

- **General concerns**

- REP agreed amongst search engines
- Not binding and not enforceable
- Interpreted and applied differently
- Ignored by many
- No supervising body

- **Insufficient Differentiation: *Robots.txt* – index or no-index**

- Only option: disallow indexing of entire site, directory, webpage, specific image, files of a specific file type
- Other actions (display, archive etc) can only be excluded via Meta-Tags

- **Insufficient Differentiation: *Robots Meta Tags* – entire webpage or nothing**

- Need to differentiate between various types of uses and their respective purposes
- No „all or nothing“ approaches
- Determination of scope of allowed usage by content providers not users

# Why the REP does not suffice II

## Example for Use of Press Articles

<b>You cannot block..</b>	<b>..without also blocking</b>
Google News	„News to...“ results boxes in Google Web Search
Google News	Google Alert
Display of Snippets	(Instant) Previews
Google Web Search	Affiliates using the Google Index (eg AOL, Gmx.com, MySpace, T-Online.de)
Google form crawling one item (eg an article) on a webpage	all other items on that webpage

# Why the REP does not suffice III

- **Google's Webmaster-Tools: access to content is crucial for ranking**

- *“Provide high-quality content on your pages, especially your homepage. This is the single most important thing to do.”*
- *“Make your site easily accessible”*
- *“Blocking Google from crawling a page is likely to decrease that page's ranking or cause it to drop out altogether over time. It may also reduce the amount of detail provided to users in the text below the search result.”*

- **SEO-Expert ([webconfs.com/15-minute.seo.php](http://webconfs.com/15-minute.seo.php))**

- *“If indexing of a considerable portion of the site is banned, this is likely to affect the non-banned part as well because spiders will come less frequently”*

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# Myth 1: the right destroys the Internet as it makes it illegal to link or share publications

## 1. The link is safe:

- I. Recital 33: „*This protection does not extend to acts of hyperlinking*“
- II. Case of the CJEU on „communication to the public“

## 2. **Sharing** press publications on social networks **will not be limited** any further:

- I. Sharing is usually based on framing or inline linking.
- II. Publishers wish to engage with with their audience; by inviting readers to share articles via sharing buttons, publishers consent to the use of their works.
- III. As of today, any reproduction of original articles is already illegal for infringing the author’s copyright.

## **Myth 2: the right harms consumers as it makes it more difficult to access and disseminate content**

- 1. Information** in press publications **remains freely accessible.**
- The right is incapable of controlling the flow of information. Any published **idea or fact remains unprotected.**
- While consumers are always interested in free copies of works, without **incentives to create works**, there won't be copies either.
- 4. Alternatives would be even worse** for consumers
  - less investments in quality content
  - less content made available online
  - more content hidden behind paywalls with rising subscription fees
- Preserving a diverse quality press is an aim in the **public interest** which is capable of justifying restrictions to freedom of information.

## *Myth 3:* the right harms journalists as they are increasingly dependent on maximum exposure

1. The right aims at securing the **sustainability of the entire press**, including its journalists.
2. **Journalists** presumably **prefer being paid to being visible**.
3. The right **will not reduce the overall consumption** of press publications.

# Myth 4: the publisher's right will stifle innovation and harm start-ups

1. Clarifying the scope for the use of press publications at EU level **will increase legal certainty** which in the interest of all.
2. The rights will allow for **more innovations by press publishers**.
3. In turn, companies that are basing their businesses on **free-riding on** third-party investments without consent are acting at their **own risk**.
4. Policy should encourage investments **and innovations across the entire value chain**, including the production of content, not just at the level of its distribution.

# Myth 5: the right is about protecting publisher's „old“ business models

1. Publishers were amongst the first to engage the online markets.
2. The publisher's right is not about ensuring subsidies but about creating a **fair level playing field on the online advertising markets** where content creators and content distributors compete for the same advertisers.
3. The unauthorised reproduction of news content affects all business models for publishers including any subscription-based models.

## *Myth 6: an equivalent publishers' right has already failed in Germany and Spain*

1. The proposed EU right is **not identical** with the German and Spanish legislations.
2. In both Germany and Spain the legislation **succeeded in preventing a further escalation** of the scope of use of press publications.
3. The Spanish model **increased direct traffic** to press publishers.
4. The remuneration **disputes** with Google are **not yet decided** and are based on issues of monopoly power.
5. The **European proposal can overcome any shortcomings** of the German and Spanish legislation.

# Summary I

## 5 reasons why the publisher's right is overdue

1. Press publishers require the **marketing sovereignty** over the large-scale digital use of their products.
2. Non-exclusive **licences from authors are insufficient.**
3. **Equivalent rights** have been **long established** for other media publishers (broadcasters, music and phonogram producers).
4. The **decision** of whether an aggregator is more useful than harmful for a press publisher should lie with the press publisher not the aggregator.
5. In the digital age, a **free press which is indispensable for democratic societies** requires sustainable private press publishers.

# Summary II

## 5 reasons why a publishers right is no threat

1. The protection **does not cover hyperlinks or frames** to press publications, e.g. in social media.
2. Since press **publishers are free to waive their rights**, platforms that really create added value will quickly come to terms with publishers.
3. The **general exceptions** and limitations of copyright **apply** (e.g. the right to quote, private use).
4. The term of the protected „**press publication**“ is **narrowly defined**.
5. The **right is narrower** than that granted to broadcasters, film and music producers (no exclusive distribution, renting or lending)

Thank you!

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